No. 89-1852

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

RAY STANLEY FURRH

Petitioner,

VERSUS

SABINE TOWING & TRANSPORTATION COMPANY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. The District Court/Fifth Circuit Court of Appeals erred in not finding the M/V TITAN unseaworthy because the M/V TITAN did not furnish an adequate crew to handle the lines.

II. The District Court/Fifth Circuit Court of Appeals erred in not finding the defendant negligent for failure of the M/V TITAN to furnish an adequate crew to handle the lines.

III. The District Court/Fifth Circuit Court of Appeals erred in not finding that the plaintiff's back surgery was causally related to his accident of October 25, 1984.

TABLE OF CONTENTS

Page

Questions Presented . . . . . -i-

Table of Contents . . . . . -ii-

Table of Authorities . . . . . -iii-

Opinions Below . . . . . -iv-

Jurisdiction . . . . . -v-

Statement of the Case 1

Statement of the Facts 2

Argument 17

Conclusion 21

Certificate of Service 22

TABLE OF AUTHORITIES

Pages

Benedict on Admiralty, Vol. 1B, pg. 3-71 thru 3-73 17

Crumady v. J. H. Fisser, 358 U.S. 423, 79 S.Ct. 445, 3 L.Ed.2d 413, 1959 A.M.C. 580 (1959) 18

Mahnich v. Southern S.S. Co., 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561, 1944 A.M.C. 1 (1944) 18

Reed v. S. S. Yaka, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448, 1963 A.M.C. 1373 (1963) 19

Waldon v. Moore-McCormack Lines, Inc., 386 U.S. 724, 87 S.Ct. 1410, 18 L.Ed.2d 484, 1967 A.M.C. 579 (1967) 17

OPINIONS BELOW

The initial Opinion of the United States District Court for the Eastern District of Texas, Beaumont Division, is dated May 30, 1989 and unreported, but appears at App. A, infra, pp. 1a-10a. The Opinion of the United States Fifth Circuit Court of Appeals is dated February 16, 1990, and unreported, but appears as App. A, infra, pp. 11a-14a.

JURISDICTION

The judgment of the court below (App. A, infra., pp. 9a-10a) was entered on May 30, 1989. An appeal was taken to the United States Circuit Court of Appeal which affirmed in a decision rendered on February 16, 1990 and unreported. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

Ray Stanley Furrh has brought this action against his employer, Sabine Towing and Transportation Company, Inc., under the Jones Act and General Maritime Law for damages for a back injury sustained on October 25, 1984 while he was assigned to the M/V TITAN. Sabine Towing and Transportation Co., Inc. has paid all maintenance and cure.

The case was tried to the District Court without a jury on December 14, 1988 and the Court rendered a "Memorandum Opinion" on May 26, 1989 finding in favor of Sabine Towing and Transportation Company, Inc.

The Fifth Circuit Court of Appeals affirmed the District Court in its written opinion dated February 16, 1990.

STATEMENT OF FACTS

Ray Stanley Furrh was born in Port Arthur, Texas on December 18, 1950, and went to school through the ninth grade at Woodrow Wilson High School until 1964.

From 1964 until 1982 Ray Stanley Furrh worked at various Honda shops in this area as a mechanic, various auto dealers as a salesman, various marine shipyards as a pipe welder and finally as a deckhand for Western Towing from 1980 to 1982 and in 1982 Ray Stanley Furrh was employed by Sabine Towing & Transportation Company as a deckhand. As a deckhand for Sabine Towing Transportation, he worked four on and four off and was paid $41.00 a day for twelve hours.

In October, 1983, Ray Stanley Furrh sprained his back while working for Sabine Towing and Transportation, spent twelve days in the hospital and returned to work.

On or about October 25, 1984, Ray Stanley Furrh was assigned to the M/V TITAN as a deckhand along with Buck Reynolds, Captain, Ferrel Frazer, Engineer and Tom Ellis, deckhand.

Between 10:00 A.M. and 11:00 A.M. on October 25, 1984, the bow of the M/V TITAN was tied to the port side of a seagoing barge which was docked at Harbor Island for the loading of railroad cars on the seagoing barge. During this time it was necessary to shift the barge.

Captain "Buck" Reynolds sent Ray Stanley Furrh and Tom Ellis onto the barge to untie the two lines securing the seagoing barge to the dock to allow the M/V TITAN to shift or move the barge down the dock and then re-tie or secure the barge to the dock after it had been moved or shifted.

Ray Stanley Furrh went to the bow of the seagoing barge which had a line about 200' long and 6" in diameter. Tom Ellis went to the stern line. To move the seagoing barge both lines have to be untied and tied simultaneously.

Ray Stanley Furrh succeeded in untying his line at the bow. To properly secure the seagoing barge it was necessary to re-tie the lines at an angle to function as spring lines. Ray Stanley Furrh could not move his line by himself, but struggled with sections of the line to get it secured to the bit on the dock. As he was trying to pull the slack out of the line secured to the bit on the dock to wrap the line around the cord on the seagoing barge, he felt pain in his lower back. We quote from the deposition of Ray Furrh, at page 67:

> A. Well, I was up on the barge; and I was moving - transferring - a line, tying the barge off. And it was a lot of line. And there was a doubled-up line, and I had shifted it from - from the middle of the barge to the end of the barge to the bow of the barge where I was going to tie it off there. But then I only had two lines to tie the whole barge off, and one line was the--The stern line was a short line, and the only place to tie it off at was - you know, that would do it any good at all - was--Well, it meant that I had to shift my line back.
>
> And, so, I carried my line back and doubled it up; and that's--And when I went down - when I pulled my slack out of the line and I went down to make it fast, is when my back went.
>
> Q. What kind of line was it?

A. A regular tie-off line for seagoing barge. And it was a pretty long line and it was a long lead and it was doubled up.

Q. Was it nylon line, hemp, poly, steel or cable or what?

A. No, it wasn't steel; and it wasn't grass. It was–I don't know. I guess nylon, whatever - whatever kind of material that it was. I don't know.

Q. How big around was it?

A. I would say 6, 8 inches, somehting like that.

Q. When you say 6, 8 inches around, you mean the circumference from point to point?

A. A circumference.

Q. And how long was this one particular line that you were tying off?

A. Oh, I had a good 30 foot to the bit then doubled up. So, that would make a good 60 foot of line, I would say. And, then, the rest of the line I might have had 50 foot or so of tail.

Q. Do you remember what day this accident happened?

A. October 25th.

Further, plaintiff testified in his deposition at page 70:

Q. Were you tied up when this accident happened?

A. Were we tied up?

Q. Were you there at the dock?

A. We were tied to the seagoing barge.

Q. You were in the water?

A. Un-huh.

Q. You weren't at anyone's dock?

A. You are confusing me.

Q. Were you in transit; Was the vessel and its barge and its tow in transit, or were you tied up at the dock when the accident happened?

A. The barge was tied up at Harbor Island where they were loading train cars on it. We went from Continental Grain to Harbor Island, light boat.

Q. Whose barge was it that you were tying off?

A. I have no idea. I think it might have been a Candies. I'm not sure.

Q. When you got up to it, was she full?

A. No, she -They only had about four or five of the train cars on it. They were still welding train rails - train car - where the tracks on the barge - where they could--They still had a bunch of train cars to put on it.

Q. So, they were in the process of readying it?

A. They were in the process of loading it. They were still readying it, but they were loading the train cars on it.

Q. And what time did you get there to Harbor Island?

A. Well, it was five or ten minutes after we docked the ship at Sabine - I mean at Continental.

Q. So, far argument's sake of this accident - - -

A. (Interrupting) 10:30 or 11:00 o'clock somewhere right in there - a.m.

Q. And how long were you engaged in this line shifting process before the accident happened?

A. I had already - I guess a good 10 minutes or 15 minutes. I was--I worked with that line, I guess, a good 20 minutes.

Q. Did someone order or instruct you to go out there and do something?

A. Yes, my captain ordered me.

Q. What did he tell you to do?

A. To do whatever had to be done out there to shift line, if it needed to be shifted, to secure the barge.

Q. I'm not sure I understand.

A. They were shifting--They wanted to shift the barge down where it would be easier for them to load their cars, the train cars.

Q. You wanted to shift it further down the dock?

A. Right. We shifted the barge--I mean we untied the barge completely from the dock and shifted it - and moved it.

Q. So, your tug was made fast to the barge?

A. Right. We had a line out on the barge. I had a line.

Q. And how many lines were there from the barge to the dock?

A. Two.

Q. Where were they when you first started?

A. One on the stern and one up forward.

Q. And how many times was the barge moved down the dock?

A. Well, to get it in the position where they wanted it, I guess twice. We went downstream, and then we had to go back upstream a little ways.

Q. Did you have to - - -

A. (Interrupting) I had to carry the line from the moor of the forward–Well, I had the forward line; and it was the long line, the longest line of the two that they had to secure the barge. And I shifted it all the way up to the bow of the barge because I was up on the rake, in fact.

And the stern line was short, too short to make it - to secure the barge properly, really. So, Tom - he was the other deckhand. Where he had to tie it off at, both lines would have been leading forwards; and the barge wouldn't have stayed in the dock at all. So, I had to shift my lines back. So, I carried–You [k]now, I had to carry it back which - then loop my bit down on the dock and pull my line up, you know, my slack.

Q. Whose lines were they?

A. They were on the barge.

Q. So, the lines that were securing the barge to the dock at the time you got there were the ones you were moving around?

A. Right.

Q. Was there any additional line on the TITAN?

A. We only put out one head line on the barge off the TITAN.

Q. Was there a line that wasn't being used in the TITAN that you could have used if you had wanted?

A. Yes, sir, there was a couple of lines, the boat's lines, that we used to make up to the ships.

Q. But they weren't used at that time because you were made up to a barge?

A. Well, we wasn't using our lines to secure the barge, no.

Q. Were you doing that line shifting job by yourself?

A. I had one line. The other deckhand was working the other - working the stern line.

Q. What was his name?

A. Tom Ellis.

Q. So, if there were two of you doing the job and you moved it twice - - -

A. (Interrupting) I worked on line by myself. I worked the forward line by myself.

Q. And you shifted that line twice?

A. Correct.

Q. And by "shifting" it, what that entails is unwrapping it from the dock, carrying it down, and wrapping it again?

A. Yes, more or less.

Q. And the barge is against the dock, pretty close to the dock?

A. Yeah.

Q. Do you have to pick up the line and carry it?

A. Yeah, I had to carry it and drag it. There was so much line, I couldn't carry it all.

Q. You couldn't carry it all because it was physically too big to pick up?

A. Physically too heavy.

Q. How much do you think the whole line weighed?

A. I have no idea. I don't know how much line was there. I know it was a good 200 feet of line, I'd say.

Q. You felt like you hurt your back when you were securing it on the second time?

A. When I shifted the line, yes. When I shifted the line back down the barge and when I pulled it up. When I pulled up the slack, when I went over to holding the slack and, you

know, trying to keep the line as taut as I could. And when I went down to make my first wrap on the clavel is when it happened.

Q. When [What] does a clavel look like?

A. Like cow horns.

Q. Is it right up on the deck?

A. It's off the deck. It's--The center part of it is welded to the deck; and it comes up so high - 6 inches or so off the deck. And it has these horns out (demonstrating with hands).

Q. How far would you have to bend over to touch it:

A. Oh, about 6 or 8 inches from the deck.

Q. You said you were pulling the slack out like you pulled the slack when your back went out. Correct me if I am wrong; but, as I understand it, you already have the line secured to the dock. Is that right?

A. No.

Q. It's not?

A. It's not secured. I had a doubled-up line, and the eye of the line was on my clavel. And then it went from the barge down to the bitt on the dock then back up to the barge.

Q. So, it was just looped around the bitt on the dock?

A. Yeah, it was hung on it, yeah.

Q. And you were going - - -

A. (Interrupting) I had to pull the line, pull the slack.

Q. You are going to pull the slack up then tighten it up, and wrap it around the clavel again?

A. Yes, something like that.

Q. Is that the way it's done?

A. Well, yes, you pull all the slack out and make your fast on any line.

Q. When exactly was it that you felt you[r] back going out, after you reached down?

A. After I pulled the slack out of the line.

Q. Okay.

A. And I went over- Holding the line taut to make the first wrap, making it fast, is when it happened.

Q. So, as I understand it, when you were pulling the slack out, you were facing the bitt on the dock and you are standing upright as you are pulling it: is that right?

A. Yes.

Q. And the idea is to hold it taut then bend over and wrap it around the clavel before it goes loose on you again.

A. Yeah.

Q. At what point during that operation did you feel your back hurting you?

A. When I went over to make it fast.

Q. As you bent over to make it fast or to tie it on?

A. I was already there.

Q. But you had to bend over. When you pulled the slack out, you were standing up; right?

A. Yeah. When I pulled the slack out of the line, I was standing up.

Q. And you had to bend over to wrap it around the kevel [clavel].

A. Right.

Q. It was during that bend that you felt your back going out on you?

A. Yes, when I made my first down loop for the end of the clavel to start making my Figure "8's".

Q. Was Mr. Ellis out there on the stern line at that time?

A. Correct.

Q. Did he see the accident happen?

A. I have no idea.

Q. Did you ever ask him whether or not he saw it?

A. No.

Q. Never talked to him about it?

A. Yeah, I told him then.

Q. You told him your back hurt?

A. Yeah. I told my captain then. I finished making up and tying off that line and went over to the boat.

Q. Had you ever shifted lines before?

A. Sure.

Q. It's a pretty common job for a deckhand?

A. Uh-huh. It's a pretty common job, pretty common job.

Q. Was there anything unusual about that particular job that was, say, different from any other times that you had done it?

A. Yeah. There should have been two men on the line because of the length of the line and the distance - the distance.

Captain Buck Reynolds testified Ray Stanley Furrh was a good deckhand and always did what he was told. Captain Reynolds thought that longshoremen were on the seagoing barge and would help Ray Furrh with the lines. Tom Ellis testified he handled the stern line by himself without incident.

Ray Stanley Furrh reported his injury and was taken off the M/V TITAN and seen at St. Mary's Hospital at the emergency room. He was seen by Dr. Martin R. Haig on October 26 and 31, 1984 for back pain and then was seen by Dr. Russell McDonald on November 1, 1984. He then saw Dr. M. Fukuda on November 6, 19, 27 and December 3, 1984. Ray Stanley Furrh was admitted to St. Mary Hospital and on December 14, 1984, a laminectomy and foraminotomy at L4-L5, L5-S1 were performed with the surgical findings noted as follows:

> Findings: On the right side the L5 nerve root is swollen, minor discoloration. On the whole the patient has an unusual posterior element of the bone and curved in deep. Most likely this is the cause of spinal stenosis. L5 on the left side appears to be in normal color and diameter as well as S1 on the left. However, on the right side, S1 nerve root appeared to be enlarged. The intervertebral disc is a minor degree of pouched out. A ruptured disc is noted. Irrigation is carried out using Garamycin solution. Hydrocortisone is sprayed. Fat is placed as well as Gelfoam around the laminectomized site. The wound is closed following insertion of meovac drainage in situ. Dry dressing is applied. At the end of the procedure general condition is satisfactory.

Post operative care was provided through January 11, 1984.

Dr. Pete Rhymes, an orthopedic surgeon, saw Ray Stanley Furrh on May 13, 1985 periodically through June 11, 1987. A disability rating of 5% to 10% was assigned and restrictions were assigned of not lifting more than forty pounds maximmum, not to lift ten to fifteen pounds frequently, and no repetitive stooping, squatting, bending, walking on uneven surfaces and not to go up and down stairs on a frequent basis. The last diagnosis was back pain with the limitations outlined above. Dr. Rhymes stated Ray Stanley Furrh could not return to work as a deckhand. Dr. Rhymes testified that Ray Stanley Furrh's back injury was related to the accident of October 25, 1984. In his deposition at page 36, Dr. Rhymes testified:

> Q. And if there was in fact no significant follow-up following either of these accidents and then he had the pain that he described on October 25 and then was followed up and subsequently and surgery performed, do you have any problem relating the incident that he had on October 25, to the back pain for which you treated him?
>
> A. No.

And at page 10 of deposition, Dr. Rhymes testified:

> Q. Doctor, the history he gave you as to the mechanics of shifting a line on a seagoing barge, would that be consistent with the type of injury that he suffered?
>
> A. Yes, I think so.

In 1981 the earnings were $10,550.00, $13,108.00 in 1982, $9,793.00 in 1983 and $15,513.00 in 1984.

ARGUMENT

This is a very simple Jones Act case. The captain failed to furnish enough men to handle the lines of the seagoing barge. This rendered the vessel unseaworthy.

In Benedict on Admiralty, Volume 1B at page 3-71 through 3-73, it is stated as follows:

> See *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724, 87 S.Ct. 1410, 18 L.Ed.2d 484, 1967 A.M.C. 579 (1967). (The question presented was "whether a vessel is unseaworthy when its officers assign too few crewmen to perform a particular task in a safe and prudent manner." The plaintiff and four other seamen were engaged in a docking operation when the third mate instructed the plaintiff and another crewman to put out additional mooring line. While uncoiling this very heavy rope the plaintiff fell and injured his back. There was expert evidence to the effect that "safe and prudent seamanship" called for assigning no fewer than three men to handle the rope. The plaintiff contended that the unseaworthiness lay in the fact that too few men were assigned to perform this specific task; there was no allegation that the vessel as a whole was insufficiently manned, that the rope was defective, or that the third mate or the seaman assisting plaintiff was incompetent. The Supreme Court reversed

the findings of the district court and the court of appeals that the vessel was seaworthy and that the plaintiff's only basis for recovery was the negligence of other crewmembers: "The basic issue here is whether there is any justification, consistent with the broad remedial purposes of the doctrine of unseaworthiness, for drawing a distinction between the ship's equipment, on the one hand, and its personnel, on the other. As regards equipment, the classic case of unseaworthiness arises when the vessel is either insufficiently or defectively equipped [*Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561, 1944 A.M.C. 1 (1944)], . . . And . . . , even though the equipment furnished for the particular task is itself safe and sufficient, its misuse by the crew renders the vessel unseaworthy [*Crumady v. J.H. Fisser*, 358 U.S. 423, 79 S.Ct. 445, 3 L.Ed.2d 413, 1959 A.M.C. 580 (1959)]. . . . In *Boudoin* . . . we said, 'We see no reason to draw a line between the ship and gear on the one hand and the ship's personnel on the other' . . . We likewise see no reason to draw that line here. That being so, under *Mahnich* it makes no difference that respondent's vessel was fully manned or that there was a sufficient complement of seamen engaged in the overall docking operation, for there were too few men assigned 'when and where' the job of uncoiling the rope was to be done. And under *Crumady* it makes no difference that the third mate and two men he assigned to perform the job were themselves competent seamen, or that the rope

was itself a sound piece of gear. By assigning too few men to uncoil and carry the heavy rope, the mate caused both the men and the rope to be misused. This analysis, we believe, is required by a clear recognition of the needs of the seaman for protection from dangerous conditions beyond his control and the role of the unseaworthiness doctrine which, by shifting the risk to the shipowner, provides that protection. If petitioner had been ordered to use a defective pulley in lifting the rope, he would clearly be protected by the doctrine of unseaworthiness. If the pulley itself were sound but petitioner had been ordered to load too much rope on it, he would likewise be protected. If four men had been assigned to uncoil the rope but two of the men lacked the strength of ordinary efficient seamen, petitioner would again be protected. Should this protection be denied merely because the shipowner, instead of supplying petitioner with unsafe gear, insufficient gear, or incompetent manual assistance, assigned him insufficient manual assistance? We think not. . . We [have] noted that "the hazards of maritime service, the helplessness of the men to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the 'humanitarian policy' of the doctrine of unseaworthiness,' [*Reed v. S.S. Yaka*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448, 1963 A.M.C. 1373 (1963)], should prevent the shipowner from delegating, shifting or escaping his duty by using others' men or others' gear to perform the ship's work.

> By the same token, the shipowner should not be able to escape liability merely because he has used men rather than machines or physical equipment to perform that work.") . . .

Based on the law of the Supreme Court and the facts of this case, there can be no other conclusion than that the vessel was unseaworthy and the defendant failed to furnish an adequate number of men to handle the line.

As to medical causation, there is absolutely no dispute that Dr. Rhymes clearly stated that the surgery was related to the accident of October 25, 1984.

CONCLUSION

We respectfully submit that the District Court and the Fifth Circuit Court of Appeals were in error in failing to find Sabine Towing and Transportation Company, Inc.'s vessel unseaworthy, in failing to find Sabine Towing and Transportation Company, Inc. negligent and failing to find Ray Stanley Furrh's back injury causally related to the accident of October 25, 1984.

We respectfully request that the decision be reversed in favor of the plaintiff.

CERTIFICATE

I hereby certify that a copy of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on Behalf of Petitioner, Ray Stanley Furrh, has been furnished all counsel of record on this the 17th day of May, 1990.

Joseph J. Weigand Jr. pro se

JOSEPH J. WEIGAND, JR.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-87-1134-CA

RAY STANLEY FURRH

VS.

SABINE TOWNING &
TRANSPORTATION CO., INC.

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EOD MAY 30 1989
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U.S. DISTRICT COURT
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TEXAS-EASTERN
BY s/s Jewel Lyons
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MEMORANDUM OPINION

The Court, having conducted a full and complete bench trial in the above referenced matter, is called upon to decide the claim of Ray Stanley Furrh ("Plaintiff") against Sabine Towing & Transportation Co., Inc. ("Defendant").

In this cause of action, Plaintiff seeks money damages pursuant to the Jones Act and General Maritime Law. Plaintiff, a former employee of defendant, claims that he injured himself while working as a deckhand on the M/V TITAN, a vessel owned and operated by the defendant. Plaintiff alleges that his back injury was caused by the Defendant's negligence and/or the vessel's unseaworthiness.

Pursuant to FED. R. CIV. P. 52, the Court having considered all the evidence and the arguments of counsel, makes the following Findings of Fact and Conclusions of Law. If any Finding of Fact should be construed as a Conclusion of Law, it is to be so considered; and should any Conclusion of Law be construed as a Finding of Fact, it is to be so considered.

FINDINGS OF FACT

1.

Plaintiff was hired by defendant on December 14, 1982. During his initial service with the defendant he worked as a deckhand aboard the M/V AJAX.

2.

On October 25, 1984, Plaintiff was assigned to the defendant's vessel, the M/V TITAN as a deckhand. The vessel was captained by Henry Reynolds. The crew included deckhands Tom Ellis the plaintiff, and an engineer, Ferrel Frazer.

3.

The M/V TITAN (a tug) is a vessel of United States Registry and was, at all times material hereto, owned and operated by the defendant.

4.

On October 25, 1984, the defendant instructed the M/V TITAN to proceed up the Neches Waterway, near Beaumont, Texas, to shift a barge along a dock at Harbor Island. The barge was a seagoing barge approximately 300 feet by 75 feet and was owned by Ottos Candies. Captain Reynolds was instructed that his job was to make-up to the barge and press it against the side of the dock.

5.

Upon arriving at the barge, Captain REynolds noticed that there was a crew of longshoremen loading railroad cars on the barge. Captain Reynolds made the M/V TITAN fast to the starboard side of the Ottis Candies barge. The Captain ordered his two deckhands to go aboard the barge and assist the longshoremen in handling the lines so that the barge could be shifted along the dock.

6.

The two deckhands proceeded with their supervisory duties. Tom Ellis remained at the stern of the barge while the Plaintiff proceeded to the bow.

7.

Defendant did not own and did not exercise control over the barge or its appurtenant equipment.

8.

The plaintiff testified[1] that there were only two lines securing the barge and that the bow line was in excess of 200 feet long. The Court finds that there were five or six lines along the barge, all of ordinary length of approximately 60 feet. The plaintiff shifted the bow line, Tom Ellis shifted the stern line and the longshoremen shifted the remaining lines.

9.

Plaintiff testified that as he was trying to pull the slack out of the bow line he felt pain in his lower back.

10.

On October 25, 1984, plaintiff reported his injury and was admitted to St. Mary's Hospital, examined and discharged to the care of a private physician. The Plaintiff was treated by a Port Arthur orthopedic surgeon, Dr. Martin Haig, between October 29 and 31, 1984. On November 1, 1984, Plaintiff was treated by Dr. McDonald, who released him to return to work. Plaintiff still complained of back pain and arrangements were made for him to be treated by Dr. Fukuda on November 6, 1984. Dr. Fukuda ordered a CT Scan and determined that Plaintiff suffered from spinal stenosis. On November 13 through 20, 1984, Plaintiff was hospitalized, again at St. Mary's, and underwent a lumbar laminectomy. Dr. Fukuda provided a follow-up office visit on Januray 11, 1985. Plaintiff failed to return for later scheduled follow-up visits.

---

1. Plaintiff did not attend trial. His testimony was submitted by deposition.

11.

The Court finds that Plaintiff experienced low back discomfort as early as June 1982 due to many events not at issue in this cause of action. Plaintiff injured his lower back in an automobile accident on June 28, 1982. Additionally, on December 7, 1983, the Plaintiff suffered an injury to his low back while manipulating a stripping wand aboard the defendant's vessel, the M/V AJAX[1]. The Plaintiff injured his back again on October 9, 1984, while working on a car transmission at home.

12.

The Plaintiff failed to establish that his October 25, 1985 reported onset of pain was anything other than a continuation of the low back discomfort he experienced from earlier events not at issue in this cause of action.

13.

The Plaintiff failed to establish that the defendant was negligent on the occasion in question.

14.

The Plaintiff failed to establish that the M/V TITAN was unseaworthy. At all time material hereto, the M/V TITAN was sufficiently manned and equipped and was seaworthy in all respects.

---

1. The injury the plaintiff suffered aboard the M/V AJAX on December 7, 1983 is barred by the three year statute of limitations. *Alvertson v. T.J. Stevenson & Co., Inc.*, 749 F.2d 223 (5th Cir. 1984).

15.

The pretrial order reflects that the plaintiff only alleged damages in the nature of pain and suffering and physical disabilities.

CONCLUSIONS OF LAW

I.

This proceeding is brought under the Jones Act, 46 U.S.C. section 688 and the General Maritime Law. This Court has jurisdiction over the parties and subject matter of this action. 28 U.S.C. sections 1331, 1333.

II.

The M/V TITAN is a vessel for purposes of the Jones Act and the General Maritime Law in that it is a water craft built for navigation and commerce. *Cook v. Belden Conc. Prod., Inc.*, 472 F.2d 999, 1001 (5th Cir. 1972), *cert. denied* 414 U.S. 868, 38 L.Ed.2d 116 (1973).

III.

On October 25, 1984, the plaintiff was a seaman and a member of the crew of the M/V TITAN. *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959).

IV.

The burden of proving, negligence and unseaworthiness falls on the injured seaman. *Chisolm v. Sabine Towing & Transportation Co., Inc.*, 679 F.2d 60, 62 (5th Cir. 1982).

V.

Setting aside the seaworthiness issue, a ship owner is only negligent "if he fails to use reasonable care to maintain a reasonably safe place to work". *Ivy v. Security Barge Lines, Inc.*, 585 F.2d 732, 741 (5th Cir. 1978).

VI.

Despite the fact that even slight negligence will give rise to Jones Act liability, the fact that an injury or accident occurs does not by itself presuppose the negligence of a ship owner. *Marvin v. Central Gulf Lines, Inc.*, 554 F.2d 1295, 1299 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035, 54 L.Ed.2d 782 (1978). Defendant was not negligent.

VII.

Although a ship owner has an absolute duty to provide a seaworthy vessel, *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549, 4 L.Ed.2d 941, 948 (1960), the vessel's warranty of seaworthiness stops at the gangway. *Russel v. City Ice & Fuel Co. of Point Pleasant*, 539 F.2d 1318 (4th Cir. 1976). The evidence here does not establish that the defendant's vessel, the M/V TITAN was unseaworthy or that such condition proximately caused an injury to the plaintiff. Plaintiff contends that his injury occurred aboard the Ottos Candies barge. He does not contend that his accident had anything to do with the condition of the M/V TITAN or its appurtenances. Thus, defendant's duty of seaworthiness does not come into play.

CONCLUSION

The plaintiff's evidence presented to the Court fails to establish that the defendant was negligent or that the M/V TITAN was unseaworthy.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the plaintiff take nothing from the Defendant. Taxable costs of court, if any, are assessed against the party incurring same.

SIGNED this 26 day of May, 1989.

s/s *(illegible)*
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

C.A. NO. B-87-1134-CA

RAY STANLEY FURRH

VS.

SABINE TOWING & TRANSPORTATION CO., INC.

EOD MAY 30 1989
(stamp)

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FINAL JUDGMENT

The Court, after having filed its Findings of Fact and Conclusions of Law herein directing the entry of judgment in favor of Defendant and against the Plaintiff, it is

ORDERED, ADJUDGED and DECREED that the Plaintiff, Ray Stanley Furrh, take nothing from the Defendant,

Sabine Towing & Transportation Co., Inc. and that this case be, and hereby is dismissed with prejudice.

DONE at Beaumont, Texas this 26 day of May, 1989.

s/s *(illegible)*
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-2635
Summary Calendar

RAY STANLEY FURRH,
Plaintiff-Appellant,

versus

SABINE TOWING & TRANSPORTATION COMPANY, INC.,
Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Texas
(CA-B-87-1134)

(February 16, 1990)

Before POLITZ, GARWOOD, and JOLLY, Circuit Judges.

PER CURIAM:[1]

In this bench-tried, personal injury suit brought under the Jones Act and the general maritime law, plaintiff-appellant

1. Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this Opinion should not be published.

Ray Stanley Furrh (Furrh) appeals the district court's judgment in favor of his employer, defendant-appellee Sabine Towing & Transportation Company, Inc. (Sabine). We affirm.

The district court found that Furrh had failed to establish negligence on the part of Sabine and likewise had not established unseaworthiness. The court further found that Furrh had failed to establish that the back pain he allegedly suffered on the day in question was due to anything other than a continuation of Furrh's back problems arising from other prior incidents not made the basis of this suit. Furrh asserts on appeal that the district court was clearly erroneous in failing to find that Sabine's tug on which Furrh was a deck hand was unseaworthy because its captain failed to furnish enough men to handle the lines of the third-party barge which were used to tie the barge to the dock.

Furrh's theory was that he injured his back while pulling an approximately six- to eight-inch circumference, two-hundred-foot-long line, which was too heavy for one man to handle. However, there was evidence from another deck hand that the lines on the barge were the smaller lines of approximately five-inch circumference and two-inch diameter and less than one hundred feet long. There was also evidence that the tug had only two types of lines, two-hundred-foot-long lines of approximately nine-inch circumference, and smaller lines of approximately five-inch circumference and one hundred feet or less in length. The district court clearly credited the testimony of the other deck hand, and failed to credit Furrh's testimony. There was no evidence—certainly no compelling evidence—that the smaller lines required two people to handle them, and the testimony of the other deck hand clearly suggests that the smaller lines did not require two people. Further, the testimony of the captain and the other deck hand indicates that the deck hands were not instructed to tie off the barge, but rather merely to be

sure that the longshoremen tied it off properly. There was nothing which would have compelled the district court to find that Furrh was required to handle the line by himself or that help from the longshoremen was not available. We are unable to conclude that the district court was clearly erroneous in determining that Furrh had not carried his burden of persuasion to establish either unseaworthiness or negligence.

Nor can we say that the district court was clearly erroneous in its further determination that Furrh had not carried his burden of persuasion to establish that the back pain he reported incurring on the day in question, October 25, 1984, was other than simply a continuance of back troubles he experienced from prior unrelated incidents. The other deck hand testified that Furrh came down to where the other deck hand was on the barge and bent over to inspect the line tie there and, when he straightened up, said that his back hurt, all in such a manner to indicate that he had just hurt it when bending over. Further, it was shown that Furrh injured his lower back in an automobile accident on June 22, 1982, and sustained another back injury, this time on the job, in December 1983, and then approximately two weeks before the alleged incident in question, reinjured his back handling an automobile transmission when he was off work. Furrh's doctor on deposition answered "No" to a question asking if there had been "no significant follow-up" of the prior incidents, and if Furrh had the pain he described on October 25, "[D]o you have any problem relating the incident that he had on October 25, to the back pain for which you treated him?" This doctor apparently first saw Furrh on May 13, 1985. We observed that Furrh had also been involved in an automobile accident in January 1985. The doctor also answered on deposition, "Yes, I think so" to a question asking whether shifting a line on a barge "would . . . be consistent with the type of injury that he

suffered?" While this testimony might have supported a finding in Furrh's favor in this respect, it does not compel it, particularly as Furrh had told the doctor he did not have back problems prior to October 25, 1984, it was not clearly established that Furrh had fully recovered from his prior back problems by that time, and the doctor noted that at least some of the back problems he observed could be either congenital or induced by trauma, and he was not sure which was the case.

On a more general level, there was no corroborating evidence to the incident in question as related by Furrh, his credibility was impeached, and the district court was simply not required to believe all that he stated.

Since we cannot say that the district court's findings are clearly erroneous, the judgment below is

AFFIRMED.

Supreme Court, U.S.
FILED
JUN 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

NO. 89-1852

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RAY STANLEY FURRH,
Petitioner,

v.

SABINE TOWING & TRANSPORTATION CO., INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	I
TABLE OF AUTHORITIES	II
STATEMENT OF THE CASE	1
(i) Statement of Proceedings and Disposition In The Court Below	1
(ii) Statement of Facts	2
SUMMARY OF ARGUMENT	6
ARGUMENT	6
CONCLUSION	8

TABLE OF AUTHORITIES

CASES	Page
Amadeo v. Zant, 108 S.Ct. 1771, 486 U.S. 214, 100 L.Ed. 2d 249 (1988)	8
Anderson v. Bessemer City, 105 S.Ct. 1504, 470 U.S. 564, 84 L.Ed.2d 518 (1985)	8

STATUTES AND RULES	
Sup. Ct. R. 10.1	6, 7

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STATEMENT OF THE CASE

(i) Statement Of Proceedings And Disposition In The Court Below

Petitioner's application arises out of a Final Judgment entered on the 26th day of May, 1989 directing the entry of judgment in favor of Respondent Sabine Towing & Transportation Co., Inc. ("Sabine") and against Petitioner Ray Stanley Furrh ("Furrh"). Furrh, a seaman, brought this action on September 30, 1987 alleging that he suffered a back injury on October 25, 1985. Furrh contended that the injury was a result of the negligence of Sabine or the unseaworthiness of the vessel M/V

TITAN. The case was tried to the district court sitting without a jury on December 14, 1988. It was stipulated that Sabine had paid all maintenance and cure which was due. On May 26, 1989 the trial court entered a Memorandum Opinion, including Findings of Fact and Conclusions of Law, and a Final Judgment in favor of Sabine. The United States Court of Appeals for the Fifth Circuit affirmed the district court by written opinion dated February 6, 1990.

(ii) Statement of Facts

Furrh was employed by Sabine in 1983. (Vol. 2, p. 48)[1] During his initial service with the company he worked as a deckhand aboard the M/V AJAX. On December 7, 1983 he suffered an injury to his low back while manipulating a stripping wand aboard the AJAX. (Plaintiff's Exh. 12, Deposition of Ray Stanley Furrh, p. 40 and Vol. 2, p. 48)[2] Furrh was hospitalized and

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1. Citation to the Record on Appeal is made by identification of the document, where applicable, followed by the volume of the Record and the page number of the volume.

2. Citation to statements made by Furrh are to his deposition. The Plaintiff did not appear at trial. His testimony was submitted by deposition in spite of the lower court's extraordinary efforts to make accommodations otherwise. (Vol. 1, p. 151) Furrh's counsel first advised the district court that his client was in prison and petitioned for a writ of habeas corpus/ad testificandum. (Vol. 1, p. 73) Counsel then advised that Furrh could not afford to travel from the correctional facility to the site of trial and obtained a continuance so that additional testimony could be obtained by deposition. (Vol. 1, p. 75) The district court entered an order compelling the warden to produce Furrh at the correctional facility. (Vol. 1, p. 98) Without further explanation, however, Furrh's counsel opted to proceed to trial without obtaining additional deposition testimony. At the conclusion of the evidence, but before closing the record, the lower court again afforded Plaintiff's counsel the opportunity to submit his client's testimony in the form of affidavit, deposition or any other discovery mechanism. (Vol. 2, p. 54) Furrh again elected not to take advantage of the trial court's generosity.

treated by an orthopedic surgeon. (*Id.*) In October of 1984, shortly before the incident which makes the basis of this suit, Furrh reinjured his back while working on his car transmission. (Vol. 2, p. 16)

On October 25, 1984, the M/V TITAN was captained by Henry Reynolds. (Vol. 2, p. 8) Its crew included two deckhands, Tom Ellis and Furrh, as well as an engineer, Farrell Frazier. (*Id.*) The tug was instructed to proceed up the Neches Waterway, near Beaumont, Texas to shift a barge along a dock. (Vol. 2, p. 9) The barge did not belong to Sabine but rather was owned by Ottos Candies. (Vol. 2, p. 17) Upon arriving at the barge, the captain noticed that there was a crew of longshoremen working on the dock, apparently installing steel rails on the deck. (Vol. 2, p. 10) Captain Reynolds' job was to make-up to the barge and press it against the side of the dock. (Vol. 2, p. 12) The lines would be handled by the longshoremen. (Vol. 2, p. 18) Captain Reynolds made the M/V TITAN fast to the starboard side of the Ottos Candies barge. (Vol. 2, p. 12) He instructed his two deckhands to stay on the dock and supervise the longshoremen's line shifting. (Vol. 2, p. 18)

The two deckhands proceeded with their supervisory duties. Tom Ellis remained at the stern of the vessel while the Plaintiff proceeded to the bow. (Vol. 2, p. 27) Both Mr. Ellis and Furrh recalled that there was in fact a crew of longshoremen up on the dock, including a supervisor. (Plaintiff's Exh. 12, Deposition of Ray Stanley Furrh, p. 83 and Vol. 2, p. 33) Mr. Ellis testified that there were five or six lines of standard length which were securing the barge to the dock. (Vol. 2, p. 27) Furrh stated that there were only two lines, one at the stern,

and one at the bow. (Plaintiff's Exh. 12, Deposition of Ray Stanley Furrh, p. 73) Furrh testified that the bow line was more than 200 feet long and that since there were no other lines to adequately secure the vessel, he had to "double up" the line and secure it in at least two different places. (Plaintiff's Exh. 12, Deposition of Ray Stanley Furrh, pps. 81, 73) When the Plaintiff completed his portion of the work, he came down and stood by Mr. Ellis, who was near the kevel at the stern position. (Vol. 2, p. 38) Furrh told Ellis he had incorrectly tied the line. (Vol. 2, p. 36) Furrh bent over and retied it. (*Id.*) As he stood up, Furrh complained that he had injured his back. (*Id.*)

Ellis testified that during the course of the shifting he did not see Furrh handling any 200 foot line. (Vol. 2, p. 33) If Tom Ellis had seen anyone attempting this super-human task, he would have offered to help. (Vol. 2, p. 34) Furrh admitted that he did not ask anyone's assistance in handling the allegedly extra long line, nor did he report any deficiency to Mr. Ellis, the longshoremen or the captain of the vessel until after he claims to have injured his back. (Plaintiff's Exh. 11, Deposition of Ray Stanley Furrh, pps. 79, 87)

On October 25th, Furrh was admitted to St. Mary's Hospital, examined and discharged to the care of a private physician. (Defendant's Exh. 6, p. 8) He was treated by a Port Arthur, Texas orthopedic surgeon, Dr. Martin Haig, between October 29th and October 31, 1984. (*Id.*) Furrh "fired" the physician because he refused to provide him with the narcotic drug Demerol. (*Id.*, at p. 7) On October 31, 1984, Furrh returned to St. Mary's Hospital and demanded Demerol. (Defendant's Exh. 8, p. 58) Dr. Owens immediately discharged him.

(*Id.*) On November 1, 1984, Furrh was treated by Dr. McDonald, who released him to return to work. Since Furrh still complained of back pain, arrangements were made for him to be treated by Dr. Fukuda on November 6, 1984. (Plaintiff's Exh. 10) The doctor ordered a CT Scan and determined that Furrh suffered from spinal stenosis. (Plaintiff's Exh. 10, p. 8) He recommended surgery. (*Id.*) On November 13 through 20, 1984, Furrh was hospitalized, again at St. Mary's, and underwent a lumbar laminectomy. (*Id.*) Dr. Fukuda provided a follow-up office visit on January 11, 1985. (*Id.*) The patient failed to return for later scheduled follow-up visits. (*Id.*) Furrh went to see Dr. Davis for continued post-operative treatment on March 19, 1985. (Defendant's Exh. 7, p. 1) He failed to return for his scheduled April visit. (*Id.*)

Petitioner's counsel referred his client to a Houma, Louisiana orthopedic surgeon, Dr. Rhymes. Furrh was treated by Dr. Rhymes between March 13 and August 28, 1985. (Plaintiff's Exh. 12, Deposition of Dr. Rhymes, p. 21) He reported continuing back pain. (*Id.*) Furrh then proceeded to miss scheduled appointments over nearly a two year period. (*Id.*) During this two year medical hiatus, Furrh did not receive any pain medication and was not treated by any doctor. (*Id.*, at p. 23) He was finally treated again, and for the last time, by Dr. Rhymes on June 11, 1987. (*Id.*) Dr. Rhymes testified that Furrh reported subjective pain complaints, however he was unable to state a diagnosis within any reasonable medical probability. (*Id.*, at pps. 23, 31, 33)

Furrh was involved in two automobile accidents which are relevant to the injuries in question. In June of 1982, six months before his employment by Sabine, the seaman was in a serious collision in which he suffered a broken

nose and a low back injury. (Plaintiff's Exh. 11, Deposition of Dr. Rhymes, pps. 28, 29) On January 18, 1985, two months after back surgery, a car Furrh was driving was "rear ended", resulting in substantial property damage. (Defendant's Exh. 3 and Plaintiff's Exh. 11, Deposition of Ray Stanley Furrh, p. 48)

On September 5, 1988, Furrh was indicted by a United States Grand Jury on felony drug charges. (Defendant's Exh. 2) He pleaded guilty to distribution of methamphetamines and was sentenced to 16 years imprisonment by the United States District Court for the Eastern District of Texas on March 3, 1988. (*Id.*) This was Furrh's second felony conviction. He was convicted of burglary a few years before trial. (Defendant's Exh. 1)

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because it fails to meet even the threshold considerations of Supreme Court Rule 10.1. There is no claim that the result causes a conflict of opinion between two United States Courts of Appeal. Likewise, the Petition does not even allege that the district court or the court of appeals acted improperly. This is a very simple Jones Act case that was correctly decided by two courts and for which further judicial consideration is unwarranted.

ARGUMENT

Furrh's Petition for Writ of Certiorari should be summarily denied because it fails to meet the threshold considerations of review. The Petition may only be granted when it details special and important reasons therefor. Sup. Ct. R. 10.1. The pending application cites no special

or important reasons compelling its review. In fact, the Petition for Writ of Certiorari is simply a verbatim copy of the original brief filed on behalf of Plaintiff/Appellant Ray Stanley Furrh in the United States Court of Appeals for the Fifth Circuit.

A closer examination of this threshold issue reveals that the Petition expressly fails to address the guidelines set out in Rule 10. The most common ground, that a court of appeals has rendered a decision in conflict with another court of appeals, is not present here. The Petitioner makes no mention of such a conflict in his application. Likewise, the only other possibly applicable guideline, that a court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, is conspicuously absent. Sup. Ct. R. 10.1(a). The Petitioner himself accurately characterizes the proceedings—"This is a very simple Jones Act case." Petition for Writ of Certiorari, page 17. It was tried to the district court without a jury. Contrary to the Petitioner's assertions, the trial court found that Furrh failed to meet his burden of proof in establishing liability. There was insufficient evidence upon which to base a finding of either negligence or unseaworthiness. Likewise, the district court determined that causation was lacking.

On appeal to the United States Court of Appeals for the Fifth Circuit, the Petitioner argued that there was some evidence of negligence, unseaworthiness and causation. All of this evidence, however, came from the deposition testimony of the Petitioner himself and was contradicted by the testimony of other witnesses. The court of appeals could only alter the trial court's findings if

it found that they were clearly erroneous. *Anderson v. Bessemer City,* 105 S.Ct. 1504, 470 U.S. 564, 84 L.Ed. 2d 518 (1985). Three fact witnesses, including the Petitioner, testified at trial, by deposition or otherwise. Two of the witnesses offered a plausible explanation as to the events which occurred that was different than Furrh's recollection. The fact finder, in choosing between those versions, can virtually never be clearly in error. *Amadeo v. Zant,* 108 S.Ct. 1771, 486 U.S. 214, 100 L.Ed.2d 249 (1988).

Nothing in the Petition for Writ of Certiorari even begins to raise a question as to the proprietary of the conduct of either the district court or the court of appeals. The Petition falls far short of showing any special or important reasons for Supreme Court review.

CONCLUSION

Sabine submits that the courts below were correct in entering Final Judgment in its favor and requests that all findings of the district court and the opinion of the United States Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

GRIGGS & HARRISON

DAVID E. BLACK
Attorney for Respondent
Sabine Towing & Transportation Co., Inc.